

1 Frank A. Balistreri
2 Attorney at Law
3 CSB #93338
4 105 West F Street, Suite 215
5 San Diego, CA 92101
6 Telephone:(619) 881-7487

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8 Attorneys for Defendant, JOSE HEREDIA-GUZMAN

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11 (HONORABLE JEFFREY T. MILLER)

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JOSE HEREDIA-GUZMAN (1),

16 Defendant.
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Case No.: 07-CR-3353-JTM

Date: 1-4-2008

Time: 11:00 a.m.

MEMORANDUM OF POINTS
AND AUTHORITIES
IN SUPPORT
OF DEFENDANT'S MOTIONS

19 Defendant, JOSE HEREDIA-GUZMAN, by and through counsel, Frank A.
20 Balistreri, hereby submits the following memorandum of points and authorities in support of
21 his motions.

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1 MOTION TO COMPEL DISCOVERY AND PRESERVE EVIDENCE

2 Defense counsel has received some discovery in this case. However, because Mr.
3 Heredia-Guzman believes that there may be other discovery outstanding, he moves for the
4 production by the government of the following discovery and for the preservation of
5 evidence. This request is not limited to those items that the prosecutor knows of, but rather
6 includes all discovery listed below that is in the custody, control, care, or knowledge of any
7 government agency. See generally Kyles v. Whitley, 514 U.S. 419 (1995); United States v.
8 Bryan, 868 F.2d 1032 (9th Cir. 1989).

9 (1) The Defendant's Statements. The Government must disclose to the defendant
10 all copies of any written or recorded statements made by the defendant; the substance of
11 any statements made by the defendant which the Government intends to offer in evidence
12 at trial; any response by the defendant to interrogation; the substance of any oral
13 statements which the Government intends to introduce at trial and any written summaries of
14 the defendant's oral statements contained in the handwritten notes of the Government
15 agent; any response to any Miranda warnings which may have been given to the defendant;
16 as well as any other statements by the defendant. Fed. R. Crim. P. 16(a)(1)(A) and (B).
17 The Advisory Committee Notes and the 1991 amendments to Rule 16 make clear that the
18 Government must reveal all the defendant's statements, whether oral or written, regardless
19 of whether the government intends to make any use of those statements.

20 (2) Arrest Reports, Notes and Dispatch Tapes. The defense also specifically
21 requests that all arrest reports, notes and dispatch or any other tapes that relate to the
22 circumstances surrounding his arrest or any questioning, if such reports have not already
23 been produced in their entirety, be turned over. This request includes, but is not limited to,
24 any rough notes, records, reports, transcripts or other documents in which statements of
25 the defendant or any other discoverable material is contained. Such material is
26 discoverable under Fed. R. Crim. P. 16(a)(1)(A) and (B) and Brady v. Maryland, 373 U.S.

83 (1963). See also Loux v. United States, 389 F.2d 911 (9th Cir. 1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant are available under Fed. R. Crim. P. 16(a)(1)(B), Fed. R. Crim. P. 26.2, and Fed. R. Crim. P. 12(h). Preservation of rough notes is requested, whether or not the government deems them discoverable.

(3) Brady Material. Defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Under Brady, impeachment as well as exculpatory evidence falls within the definition of evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976).

(4) Any Information That May Result in a Lower Sentence Under The Guidelines. As discussed above, this information is discoverable under Brady v. Maryland, 373 U.S. 83 (1963). This request includes any cooperation or attempted cooperation by the defendant, as well as any information that could affect any base offense level or specific offense characteristic under Chapter Two of the Guidelines. Also included in this request is any information relevant to a Chapter Three adjustment, to a determination of the defendant's criminal history, or to any other application of the Guidelines.

(5) Any Information That May Result in a Lower Sentence Under 18 U.S.C. § 3553. After United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), the Guidelines are merely advisory and federal sentencing is governed by 18 U.S.C. § 3553, which requires a judge to consider "any information about the nature of the circumstances of the offense." 18 U.S.C. § 3553(a)(1). This broad range of judicial discretion, combined with the mandate that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3661, means that any information whatsoever may be "material ... to punishment,"

1 Brady, 373 U.S. at 87, whether or not the government deems it discoverable.

2 (6) The Defendant's Prior Record. Evidence of prior record is available under Fed.
3 R. Crim. P. 16(a)(1)(D). Counsel specifically requests that the copy be complete and
4 legible.

5 (7) Any Proposed 404(b) Evidence. Evidence of prior similar acts is discoverable
6 under Fed. R. Crim. P. 16(a)(1)(E) and Fed. R. Evid. 404(b) and 609. In addition, under
7 Fed. R. Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide
8 reasonable notice in advance of trial . . . of the general nature" of any evidence the
9 government proposes to introduce under Fed. R. Evid. 404(b) at trial. The defendant
10 requests that such notice be given three weeks before trial in order to give the defense time
11 to adequately investigate and prepare for trial.

12 (8) Evidence Seized. Evidence seized as a result of any search, either warrantless
13 or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(E).

14 (9) Request for Preservation of Evidence. The defense specifically requests that all
15 dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise put
16 out of the possession, custody, or care of the government and which relate to the arrest or
17 the events leading to the arrest in this case be preserved. This request includes, but is not
18 limited to, the results of any fingerprint analysis, alleged narcotics, the defendant's personal
19 effects, the vehicle, and any other evidence seized from the defendant, or any third party. It
20 is requested that the government be ordered to question all the agencies and individuals
21 involved in the prosecution and investigation of this case to determine if such evidence
22 exists, and if it does exist, to inform those parties to preserve any such evidence.

23 (10) Tangible Objects. The defense requests, under Fed. R. Crim. P. 16(a)(1)(E)
24 the opportunity to inspect and copy as well as test, if necessary, all other documents and
25 tangible objects, including photographs, books, papers, documents, photographs of
26 buildings or places or copies of portions thereof which are material to the defense or
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1 intended for use in the government's case-in-chief or were obtained from or belong to the
2 defendant.

3 (11) Evidence of Bias or Motive to Lie. The defense requests any evidence that any
4 prospective government witness is biased or prejudiced against the defendant, or has a
5 motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987);
6 United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988).

7 (12) Impeachment evidence. Defendant requests any evidence that any prospective
8 government witness has engaged in any criminal act whether or not resulting in a conviction
9 and whether any witness has made a statement favorable to the defendant. See Fed. R.
10 Evid. 608, 609 and 613. Such evidence is discoverable under Brady v. Maryland. See
11 United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v.
12 United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness'
13 credibility).

14 (13) Evidence of Criminal Investigation of Any Government Witness. The defense
15 requests any evidence that any prospective witness is under investigation by federal, state
16 or local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir.
17 1985).

18 (14) Evidence Affecting Perception, Recollection, Ability to Communicate.
19 Defendant requests any evidence, including any medical or psychiatric report or evaluation,
20 tending to show that any prospective witness's ability to perceive, remember, communicate,
21 or tell the truth is impaired; and any evidence that a witness has ever used narcotics or
22 other controlled substance, or has ever been an alcoholic. United States v. Strifler, 851
23 F.2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980).

24 (15) Witness Addresses. The defense requests the name and last known address
25 of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th
26 Cir. 1987); United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview
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1 government witnesses by counsel is ineffective); United States v. Cook, 608 F.2d 1175,
2 1181 (9th Cir. 1979), overruled on other grounds by Luce v. United States, 469 U.S. 38
3 (1984) (defense has equal right to talk to witnesses). The defendant also requests the
4 name and last known address of every witness to the crime or crimes charged (or any of
5 the overt acts committed in furtherance thereof) who will not be called as a government
6 witness. United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).

7 (16) Name of Witnesses Favorable to the Defendant. The defense requests the
8 name of any witness who made any arguably favorable statement concerning the defendant
9 or who could not identify him or who was unsure of his identity, or participation in the crime
10 charged. Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina,
11 637 F.2d 213, 223 (4th Cir. 1980); Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir. 1978);
12 Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979).

13 (17) Statements Relevant to the Defense. The defense requests disclosure of any
14 statement that may be "relevant to any possible defense or contention" that he might assert.
15 United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982). This would include Grand Jury
16 transcripts which are relevant to the defense motion to dismiss the indictment.

17 (18) Jencks Act Material. The defense requests all material to which defendant is
18 entitled pursuant to the Jencks Act, 18 U.S.C. § 3500, reasonably in advance of trial,
19 including dispatch tapes. A verbal acknowledgment that "rough" notes constitute an
20 accurate account of the witness' interview is sufficient for the report or notes to qualify as a
21 statement under § 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963).

22 (19) Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972),
23 the defendant requests all statements and/or promises, expressed or implied, made to any
24 government witnesses, in exchange for their testimony in this case, and all other information
25 which could arguably be used for the impeachment of any government witnesses.

26 (20) Reports of Scientific Tests or Examinations. Pursuant to Fed. R. Crim. P.
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1 16(a)(1)(F), the defendant requests disclosure and the opportunity to inspect, copy, and
2 photograph the results and reports of all tests, examinations, and experiments conducted
3 upon the evidence in this case, including, but not limited to, any fingerprint testing done
4 upon any evidence seized in this case, that is within the possession, custody, or control of
5 the government, the existence of which is known, or by the exercise of due diligence may
6 become known, to the attorney for the government, and that are material to the preparation
7 of the defense or are intended for use by the government as evidence in chief at the trial.

8 (21) Henthorn Material. The defendant requests that the prosecutor review the
9 personnel files of the officers involved in his arrest, and those who will testify, and produce
10 to him any exculpatory information at least two weeks prior to trial and one week prior to the
11 motion hearing. This includes all citizen complaints and other related internal affairs
12 documents involving any of the immigration officers or other law enforcement officers who
13 were involved in the investigation, arrest and interrogation of defendant. See United States
14 v. Henthorn, 931 F.2d 29 (9th Cir. 1991). In addition, he requests that if the government is
15 uncertain whether certain information is to be turned over pursuant to this request, that it
16 produce such information to the Court in advance of the trial and the motion hearing for an
17 in camera inspection.

18 (22) Informants and Cooperating Witnesses. The defense requests disclosure of
19 the names and addresses of any informants or cooperating witnesses used or to be used in
20 this case. The government must disclose the informant's identity and location, as well as
21 disclose the existence of any other percipient witness unknown or unknowable to the
22 defense. Roviaro v. United States, 353 U.S. 53, 61-62 (1957). The defense also requests
23 disclosure of any information indicating bias on the part of any informant or cooperating
24 witness. Giglio v. United States, 405 U.S. 150 (1972). Such information would include
25 what, if any, inducements, favors, payments, or threats were made to the witness to secure
26 cooperation with the authorities.

1 (23) Expert Witnesses. Pursuant to Fed. R. Crim. P. 16(a)(1)(G), the defendant
2 requests a written summary of the expert testimony that the government intends to use at
3 trial, including a description of the witnesses' opinions, the bases and the reasons for those
4 opinions, and the witnesses' qualifications.

5 (24) Residual Request. The defense intends by this discovery motion to invoke his
6 rights to discovery to the fullest extent possible under the Federal Rules of Criminal
7 Procedure and the Constitution and laws of the United States. This request specifically
8 includes all subsections of Rule 16. Defendant requests that the government provide him
9 and his attorney with the above requested material sufficiently in advance of trial.

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17 **LEAVE TO FILE FURTHER MOTIONS**

18 JOSE HEREDIA-GUZMAN also seeks leave to file further motions, as discovery
19 and investigation are continuing.

20 Respectfully submitted,

21 S/Frank A. Balistreri

22 Dated: 12-20-07

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Frank A. Balistreri,

24 Attorney for Defendant,
25 JOSE HEREDIA-GUZMAN
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